Supreme Court, U.S.
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IN THE SUPREME COURT
OF THE UNITED STATES

JAMES RADMORE
Petitioner

v.

AEGIS COMMUNICATIONS GROUP, INC.
Respondent

On Petition for Writ of Certiorari to the Supreme Court of the United States

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Section 253 of the Delaware General Corporation Law allows a party with a ninety (90%) percent interest in a corporation to acquire and "freeze-out" the interests of the remaining shareholders without prior notice to said minority shareholders. The question presented is: Whether due process requires notice to minority shareholders of an impending merger before the merger takes place and the minority's property rights are affected?

(Answered in the negative by the Court below)

THE PARTIES TO THE PROCEEDING

James Radmore
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1500 John F. Kennedy Blvd.
Philadelphia, PA 19102
Petitioner

Aegis Communications Group, Inc
8001 Bent Branch Drive
Irving TX 75063
Respondent

CORPORATE DISCLOSURE STATEMENT

Plaintiff is not a corporation

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Section 253 of the Delaware General Corporation Law allows a party with a ninety (90%) interest in a corporation to acquire and "freeze-out" the interests of the remaining stockholders without prior notice to said minority shareholders. Said statute is violative due process clause of the Fourteenth Amendment where minority shareholders were not informed of an impending merger before the merger took place and the minority's property rights were affected. Said statute failed to meet the reasonable notice standard of Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950), even though the requirements of the statute were followed 9

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CITATIONS TO THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDER ENTERED IN THE CASE

The Order and Opinion of the United States District Court for the Eastern District Court for the Eastern District of Pennsylvania entered December 4, 2008 was not reported and is set forth in the Appendix at page 1a.

The Judgment and Memorandum Opinion of the United States Court of Appeals for the Third Circuit, Sloviter, Fuentes and Smith, Circuit Judges, entered September 24, 2009, affirming the judgment of the District Court was not reported. The Judgment and Memorandum Opinion are set forth in the Appendix at page 16a.

STATEMENT OF THE BASIS FOR THE JURISDICTION IN THIS COURT

The Judgment sought to be reviewed was entered by the Court of Appeals for the Third Circuit on September 24, 2009.

The statutory provision believed to confer jurisdiction on this Court to review on a writ of certiorari the judgment of the Court of Appeals is 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Section One of the Fourteenth Amendment of the United States Constitution provides:

"No State shall make or enforce any law which shall...deprive any person of life, liberty, or property, without due process of law...."

The Seventh Amendment of the United States Constitution provides:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Federal Rule of Civil Procedure 12 (b) provides in pertinent part:

> b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, crossclaim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

(2) lack of personal jurisdiction;

(6) failure to state a claim upon which relief can be granted

Del. Code Ann. Tit. 8 Section 253 (a) provides:

> In any case in which at least 90% of the outstanding shares of each class of the stock of a corporation or corporations ... is owned by another corporation ... the corporation having such stock ownership may either merge the other corporation or corporations into itself and assume all of its or their obligations, or merge itself, or itself and 1 or more of such other corporations, into 1 of the other corporations ...

Del. Code Ann. Tit. 8 Section 262 (d) provides:

> If the merger or consolidation was approved pursuant to ... § 253 of this title, then either a constituent corporation before the effective date of the merger or consolidation or the surviving or resulting corporation within 10 days thereafter shall notify each of the holders of any class or series

of stock of such constituent corporation who are entitled to appraisal rights of the approval of the merger or consolidation and that appraisal rights are available for any or all shares of such class or series of stock of such constituent corporation, and shall include in such notice a copy of this section....

STATEMENT OF THE CASE

The Basis for Federal Jurisdiction in The Court of First Instance

The district court had jurisdiction pursuant to diversity of citizenship, 28 U.S.C. § 1332 (a).

The Facts Material to Consideration of the Questions Involved

1. Procedural Background

This matter was commenced by Petitioner, James Radmore, against Aegis Communications Group, Inc, World Focus and Essar Investments. Aegis is part of a multi-billion dollar conglomerate headquartered in India. The action was also commenced against members of the board of directors of defendant corporations but said individuals were subsequently dismissed from the case by Agreement. The matter was commenced in the Court of Common Pleas of Philadelphia County, Pennsylvania and removed to the United States District Court for the Eastern District of Pennsylvania.

The Complaint sought damages against defendants arising from their alleged intentional wrongful acts and breach of their fiduciary duties of loyalty, duty of care and good faith to plaintiff and

others. The Complaint also alleged the transaction lacked fair dealing and fair process. The matter arose from the purchase by World Focus of 100 percent of the stock of Aegis Communications Group for $0.05 per share. Pursuant to the terms of the merger, World Focus converted Aegis, a publicly traded Corporation, into a privately held Corporation. Prior to the merger, World Focus had diluted the value of the shares so that, at the time of the merger, there were over a billion shares of common stock outstanding. Petitioner asserted the value per share was at least $1.05 per share and sought damages to be compensated for the proper market value of his investment.

Respondents filed a Motion to Dismiss pursuant to Federal Rules of Civil Procedure 12 (b) (6) and 12 (b) (2) and the "internal affairs doctrine" of the Commonwealth of Pennsylvania. On or about December 4, 2008, Judge Savage entered an Order granting Motions to Dismiss and dismissing the action as to all defendants. On September 24, 2009, the Third Circuit affirmed. In the relevant part, the Court ruled Petitioner did not need to receive notice.

2. The Material Facts

Petitioner was at all relevant times a minority shareholder of Aegis Communications Group, Inc. The matter arose from a short form merger pursuant to the Delaware General Corporation law. In the transaction, World Focus converted Aegis, a

publicly traded Corporation, into a privately held Corporation. Prior to the merger, World Focus had diluted the value of the shares so that, at the time of the merger, there were over a billion shares of common stock outstanding. Of those shares, over ninety (90%) percent were held by World Focus and the balance was held by minority public shareholders. The number of outstanding shares was increased tenfold prior to the completion of the shortform merger thereby further diluting the share value. Pursuant to the Schedule 13E-3 filing of Aegis with the Securities and Exchange Commission, only the holders of the stock of World Focus would have the opportunity to participate in the future earnings and growth, if any, of Aegis.

Despite Petitioner holding significant shares in Aegis, he was unable to object to the short-form merger pursuant to statute. His interest was directly affected and the value of his investment reduced to virtually nothing. Petitioner learned of this transaction through other sources and a dissent was therefore filed on his behalf.

The Notice sent to Petitioner's agent advised that on November 3, 2006 "ACG Acquisition, Inc., a Delaware Corporation ("ACG"), was merged (the "Merger") with and into Aegis Communications Group, Inc., a Delaware corporation (the "Company") with the Company continuing as the surviving corporation (the "Surviving Corporation")." It was the merger of the "Surviving Company", Aegis, into

World Focus, which was the subject of this lawsuit.

The conduct of respondents herein as delineated in the Complaint constituted a series of fraudulent acts and petitioner was deprived of his rights by said fraudulent acts and the breach of fiduciary duty of Respondent. The statute which permitted the shortform merger to be consummated violated the requirement of fair notice under the due process clause of the Fourteenth Amendment of the U.S. Constitution.

THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

Section 253 of the Delaware General Corporation Law allows a party with a ninety percent (90%) interest in a corporation to acquire and "freeze-out" the interests of the remaining stockholders without prior notice to said minority shareholders. Said statute is violative of the due process clause of the Fourteenth Amendment where minority shareholders were not informed of an impending merger before the merger took place and the minority's property rights were affected. Said statute failed to meet the reasonable notice standard of Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950), even though the requirements of the statute were followed.

Delaware's short form merger law, Del, Code Ann. Tit. 8 § 253 (a), has been the subject of much litigation over the years. In none of these cases has the failure of the Act to meet the fair notice requirements of the Fourteenth Amendment of the U.S. Constitution been the basis for the decision of the Court.

The very purpose of the Act is to facilitate the squeezing out of minority shareholders. See Green

v Santa Fe 533 F.2d 1283, 1289 (2d Cir. 1976), *rev'd on other grounds*, 430 U.S. 462, 97 S.Ct. 1292, 51 L.Ed.2d 480 (1977). In **Glassman v Unocal Exploration Corporation**, 777 A 2d 242 (Del 2001), the Supreme Court of Delaware noted at p. 247 that:

> The problem is that §253 authorizes a summary procedure that is inconsistent with any reasonable notion of fair dealing. In a short-form merger, there is no agreement of merger negotiated by two companies; there is only a unilateral act – a decision by the parent company that its 90% owned subsidiary shall no longer exist as a separate entity. The minority stockholders receive no advance notice of the merger; their directors do not consider or approve it; and there is no vote. Those who object are given the right to obtain fair value for their shares through appraisal.

The Court in **Glassman** held at p. 248 that absent fraud or illegality, appraisal was the exclusive remedy available to a minority stockholder who objects to a short-form merger.

Petitioner asserts that the short-form merger law can be, as it was in this case, a blueprint to defraud minority shareholders. The second circuit in **Green** described the purpose of the Act as follows:

The salient feature of this short-form merger was that a majority of 90% of the shareholders could eliminate the 10% minority without any vote of the shareholders, without prior notice to the minority shareholders, without any statement of corporate purpose and by fixing an amount to be paid per share to the minority shareholders, who were given the option of selling their shares at the stipulated price or demanding an appraisal under the auspices of the Delaware Court of Chancery, pursuant to the terms of Section 262 of the Delaware Corporation Law. We are told that the avowed purpose of these laws was to wipe out the minority. The Delaware courts have held that the sole remedy of the minority shareholders is to demand the appraisal and be paid the amount per share fixed by the appraisal. No opportunity is afforded the minority shareholder in advance of the date when the merger becomes effective to apply to any court for injunctive relief to stop the merger, nor is there any provision for rescission or other relief. Green, *supra*, p. 1289

Thus the Act as written permitted the majority shareholders to follow the letter of the law and still take the minority shareholders shares without due process.

This Court has recognized in **Mullane v. Central Hanover Bank & Trust Co.**, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950), that a state action affecting property must generally be accompanied by notification of that action: "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." This Court has since "adhered to these principles, balancing the "interest of the State" and "the individual interest sought to be protected by the Fourteenth Amendment." *Ibid.* The focus is on the reasonableness of the balance, and, as **Mullane** itself made clear, whether a particular method of notice is reasonable depends on the particular circumstances. **Tulsa Professional Collection Services, Inc. v. Pope** 485 U.S. 478, 484, 108 S.Ct. 1340 (1988).

There are essentially two parts to the Delaware shortform merger process. Initially, the parent corporation amasses ninety percent of the outstanding stock and completes the merger generally through the use of a shell corporation. The minority shareholder receives no notice of this proceeding and has no right to object. The "avowed

purpose" of the Act as noted by the Court in **Green**, was to "wipe out the minority." In the second part of the process, the minority shareholder finally receives notice of the merger and is given the opportunity to file for an appraisal. Obviously, at this point in the proceedings, the merger itself is a *fait accompli*. The Court of Appeals sanctioned this procedure at p. 7 of its Opinion (Appendix, p. 25a). This is contrary to this Court's holding in **Mullane**, *supra* and its progeny.

The record shows this is precisely what occurred in this matter. The parent corporation formed a shell corporation known as ACG Acquisition, Inc. It was this shell corporation which was merged into Aegis Communication Group, Inc. Petitioner would obviously be unaware of the existence of ACG Acquisition or the purpose for which it was formed. In fact, the shell corporation was formed for the very purpose of freezing out the interest of petitioner and the other minority shareholders.

This law permitting the taking the property of a minority shareholder without notice should be reviewed by this Court as Delaware is the jurisdiction which courts around the country look to for guidance on corporate issues. As noted by Randy J. Holland in an article in the **Journal of Corporation Law**, Spring Edition, April 1, 2009 at p. 15:

> The Delaware Constitution vests the State's Supreme Court with the power to accept and decide certified questions of law. Del. Const. art. IV, § 11(8)....

In 1983, the jurisdiction of the Supreme Court of Delaware to answer certified questions of law from the Delaware state trial courts was expanded to include certifications from the United States District Court for the District of Delaware. Ten years later, the Delaware Constitution was amended to permit the Delaware Supreme Court to hear and determine certified questions from all federal courts, including the United States Supreme Court, as well as from the highest appellate court of any other state. Randy J. Holland, **The Delaware Constitution, A Reference Guide**, note 49, at 141. In 2007, the Delaware Constitution was further amended to authorize the SEC to certify questions of law to the Delaware Supreme Court. Del. Const. art. IV, § 11(8).

The Securities and Exchange Commission also has certified cases to the Delaware Supreme Court beginning in 2008 in **CA, Inc. v. AFSCME Employees Pension Plan**, 953 A.2d 227 (Del. 2008). Thus, in addition to the due process issue presented, this matter also presents an important issue of federal law as the Federal Courts and SEC look to Delaware for guidance.

In **Mennonite Board of Missions v. Adams**, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983),

this Court noted that "actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of ***any*** party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable." *Id.*, at 800, 103 S. Ct., at 2712 (emphasis in original).

There is no question that the rights of Petitioner as a minority stockholder were adversely affected without notice. The parent corporation had diluted the value of the shares so that, at the time of the merger, there were over a billion shares of common stock outstanding. Having used this process to secure an interest of over ninety percent (90%), respondent then completed the short-form merger. Petitioner had no recourse and this was all done without the knowledge of Petitioner. This series of transactions designed to freeze-out minority shareholders without notice was completely legal under § 253.

It is clear that this procedure has troubled the Courts. Both the **Glassman** and **Green** Courts pointed out the purpose of the Act was to wipe out the minority and there was no reasonable notion of fair dealing. This Court in **Santa Fe Industries, Inc. v. Green**, 430 U.S. 462, 97 S. Ct. 1292 (1977) reversed the Court of Appeals and held a breach of fiduciary duty by majority stockholders, without any deception, misrepresentation, or nondisclosure, did not violate Rule 10b-5, 17 C.F.R. § 240 Rule 10b-5, promulgated under the Securities and Exchange Act,

15 U.S.C. §78j. **Green** had been brought under 10b-5 and the Court held Congress did not seek to regulate transactions which constituted no more than internal corporate mismanagement. The issue of reasonable notice under the Fourteenth Amendment was not decided or addressed in any way in **Green**.

The Supreme Court of Delaware has again discussed the short-form merger procedure in **Berger v. Pubco Corp.**, 976 A.2d 132 (Del., 2009). There the issue was the consequence of the controlling stockholder's failure to disclose the facts material to an informed shareholder decision whether or not to elect that exclusive remedy. The Court struggled with the issue of the remedy if full disclosure was not given pursuant to Section 253.

This Court clearly has concerns regarding the short-form merger process having previously granted certiorari in **Green**. As previously stated, the issue there was whether the process violated 10b-5 in the absence of deception or full disclosure. This Court has traditionally been troubled by failure to give reasonable notice and has stated "[t]he fundamental requisite of due process of law is the opportunity to be heard." **Grannis v. Ordean**, 234 U. S. 385, 394 (1914). This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." **Mullane**, *supra*, 339 US at p. 314.

The short-form merger process accomplishes none of these notice requirements. Rather, at the time a minority shareholder first learns of the merger, it is a *fait accompli*. The minority shareholder is powerless to stop it no matter how severely his property rights have been violated.

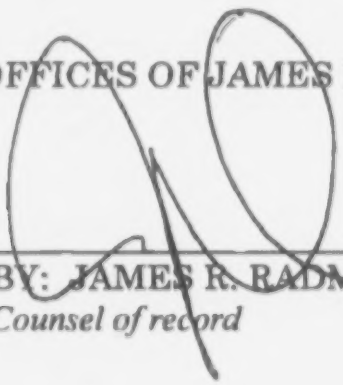
The issues herein are important and relate to significant issues worthy of this Court's attention. Petitioner no longer is a stockholder in respondent corporation and he has been deprived of this property without reasonable notice. It is acknowledged the purpose of the Delaware short-form merger statute is to "freeze out" minority shareholders. Due process requires a minority shareholder have the right to object before the merger becomes final. This matter therefore presents an important question of federal law that should be settled by this Court.

CONCLUSION

WHEREFORE, Petitioner prays this Court grant a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

LAW OFFICES OF JAMES R. RADMORE P.C.



BY: JAMES R. RADMORE, ESQUIRE
Counsel of record

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF

PENNSYLVANIA

JAMES R. RADMORE	**: CIVIL ACTION**
	:
v.	**:**
	:
AEGIS COMMUNICATIONS	**:**
GROUP, INC., *et al.*	**: NO. 08-1616**

MEMORANDUM OPINION

Savage, J. **December 4, 2008**

In this action brought by a former shareholder of a Delaware corporation alleging that the price paid for the stock by the corporation that acquired the company was far below the actual market value, we must decide whether the Delaware short-form merger statute, Del. Code Ann. tit. 8 § 253(a), limits the minority shareholder's remedy to an appraisal action, which would preclude any other form of challenge to the fairness of the merger. Before we reach that issue, we must determine whether there is personal jurisdiction over the two foreign corporate defendants.

The plaintiff, James R. Radmore ("Radmore"), a former minority shareholder of Aegis Communications Group, Inc. ("Aegis"), seeks compensatory damages for the difference between

the price he was paid and the alleged actual value of his shares, as well as punitive damages. Among those named as defendants are Aegis and Aegis's parent corporations, Essar Services (Mauritius) (f.k.a. World Focus) ("World Focus") and Essar Investments Ltd. ("Essar").[1] He alleges that the defendants breached their fiduciary duties in the execution of Aegis's merger with World Focus.

After removing the state court action, the defendants moved to dismiss it. Both World Focus and Essar have raised lack of personal jurisdiction pursuant to Fed. R. Civ. P. 12(b)(2). Additionally, the three corporate defendants have moved to dismiss for failure to state a claim upon which relief can be granted because, under Delaware law, Radmore's sole remedy is an appraisal action in the Delaware Court of Chancery. The defendants also contend that the Pennsylvania internal affairs doctrine precludes the court from exercising jurisdiction in order to avoid interfering in the internal affairs of a foreign corporation.

Because there is no personal jurisdiction over World Focus and Essar, the motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(2) will be granted as to those two defendants. The action against the remaining

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[1] Radmore had also named ten former and current members of Aegis's board of directors ("individual defendants') At oral argument, Radmore conceded lack of personal jurisdiction over the individual defendants. Tr 20:24 – 21:2 Oct. 14, 2008. He subsequently filed a Notice of Dismissal concerning these individual defendants. See Notice of Dismissal (Dec. No. 33), filed Oct. 31, 2008.

defendant, Aegis, will be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) because Radmore's sole remedy is appraisal in Delaware state court. Finally, Radmore's motion to amend his complaint will be denied because, based upon his representations that the amendment would not change any factual allegations in the complaint but only the name of one defendant, his proposed amendment would be futile.

Background and Procedural History

On November 3, 2006, World Focus, which then held over 94% of Aegis's voting stock, converted Aegis, a Delaware corporation, into a privately held corporation pursuant to a short-form merger under Delaware law.[2] Compl. ¶¶ 2, 17, 19-20, 28. Aegis's minority shareholders were paid five cents per share. *Id.* ¶ 33.

Radmore, a Pennsylvania resident, filed suit in Pennsylvania state court, alleging that the price paid to minority shareholders after the short-form merger "was blatantly unfair and fraudulent and was grossly inadequate compensation for the shares at issue." *Id.* ¶ 34. He claims that at the time of the merger, the real market value was at least $1.05 per share. *Id.* ¶ 46. He seeks compensatory damages for the difference

[2] In pertinent part, Delaware law allows a corporation owning "at least 90% of the outstanding shares of each class of another corporation's voting stock to "merge the other corporation" into the stockholder corporation. Del. Code Ann. tit 8§ 253(a).

in the alleged real value of his 1,065,500 shares and what World Focus paid for them.

Personal Jurisdiction

World Focus and Essar, both foreign corporations, contest personal jurisdiction. They aver that they have no contacts, let alone minimal ones, with Pennsylvania.

The defendants having challenged personal jurisdiction, Radmore bears the burden of demonstrating facts establishing a basis for the exercise of jurisdiction. *O'Connor v. Sandy Lane Hotel Co., Ltd.*, 496 F.3d 312, 316 (3d Cir. 2007); *Kehm Oil Co. v. Texaco, Inc.*, 537 F.3d 290, 300-01 (3d Cir. 2008). Bald assertions and legal conclusions are insufficient and Radmore must show the existence of sufficient contacts between each defendant and the forum. *Kanter v. Barella*, 489 F.3d 170 (3d Cir. 2007) (quoting *Evancho v. Fisher*, 423 F.3d 347, 350 (3d Cir. 2005)); *see, e.g., Time Share Vacation Club v. Atlantic Resorts, Ltd.*, 735 F.2d 61, 66 (3d Cir. 1984) (rejecting plaintiff's "bald, self-serving statement" concerning the defendants' contacts with the forum). Thus, to meet his burden, Radmore must present "competent evidence" showing that each defendant has therequisite minimal contacts with the forum to warrant the exercise of personal jurisdiction over each defendant. *Miller Yacht Sales, Inc. v. Smith*, 384 F.3d 93, 101 n.6 (3d Cir. 2004) (citing *Patterson v. FBI*, 893 F.2d 595, 603-04 (3d Cir. 1990)); *BP Chems. Ltd. v. Formosa Chem. & Fibre Corp.*, 229 F.3d 254, 259 (3d Cir. 2000).

Radmore argues that Essar and World Focus are subject to general jurisdiction in this forum. Radmore has not asserted nor is there any basis for specific jurisdiction, which arises when the cause of action is related to or arises out of the non-resident defendant's contacts with the forum and the injury is related to those contacts. *General Electric Co. v. Deutz A.G.*, 270 F.3d 144, 150 (3d Cir. 2001); *Pinker v. Roche Holdings Ltd.*, 292 F.3d 361, 368 (3d Cir. 2002).

The focus of general jurisdiction is on the relationship between the defendant and the forum state, not on the relationship of the claims to the forum. *See Mesalic v.Fiberfloat Corp.*, 897 F.2d 696, 699 (3d Cir. 1990). General jurisdiction exists where the nonresident has substantial, continuing and systematic contacts with the forum. *Provident Nat'l Bank v. California Fed. Savs. & Loan Ass'n,* 819 F.2d 434, 437 (3d Cir. 1987). Once these contacts are established, the defendant can be answerable for any claim even if thecause of action has no relationship to the forum. *Penzoil Prods. Co. v. Colelli Assocs., Inc.*, 149 F.3d 197, 200 (3d Cir. 2004). Thus, general jurisdiction is not premised onconduct related to the litigation, but on the defendant's unrelated contacts in the forum.

Radmore has presented no evidence that either World Focus or Essar does business in or has any contacts with Pennsylvania.[3] Rather, he relies on the parent-subsidiary relationship, arguing that "[a]s Aegis is a wholly owned subsidiary, the parent corporation, Essar, has clearly indicated it does business in Pennsylvania" and "World Focus, by its actions in taking majority ownership of Essar, also subjected to the jurisdiction of the Commonwealth of Pennsylvania." Pl.'s Opp'n at 6. Even after jurisdictional discovery, Radmore posits nothing more than "World Focus is the parent of Essar, the multi-nation conglomerate which has substantial business interests in the United States including the Commonwealth of Pennsylvania." Pl.'s Supp. Mem. at 5. He has proffered no specific evidence of these alleged Pennsylvania interests. He cites contacts by Aegis, which does not contest that it is registered to do business in Pennsylvania, and, without any evidentiary basis, argues that these contacts should be imputed to Essar and World Focus, the parent corporations. The fact that Aegis does business within Pennsylvania "does not confer jurisdiction

[3] Essar is a privately held company formed and existing under the laws of India, where it has its principal place of business. World Focus is a privately held company established under the laws of the Republic of Mauritius, where its principal place of business is also located.

over its nonresident parent, even if the parent is the sole owner." *Kehm Oil*, 537 F.3d at 301 (quoting *Escude Cruz v. Ortho Pharm. Corp.*, 619 F.2d 902, 905 (1st Cir. 1980)); *cf. Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n.13 (1984) ("jurisdiction over a parent company [does not] automatically establish jurisdiction over a wholly owned subsidiary.").

As a general rule, a subsidiary's contacts may not be imputed to the parent. *See Craig v. Lake Asbestos of Quebec, Ltd.*, 843 F.2d 145, 150 (3d Cir. 1988). To warrant imputing the subsidiary's contacts for jurisdiction, the parent must control the business operations and affairs of the subsidiary, effectively making it the parent's alter ego. *Arch v. Am. Tobacco Co., Inc.*, 984 F. Supp. 830, 836 (E.D. Pa. 1997).

Examining whether an alter ego relationship exists requires a comprehensive evaluation of all factors bearing on the intimacy of the relationship between the parent and the subsidiary. It looks to the legal relationship between the entities, the parent's ability to control and its actual exercise of control over the subsidiary, the administrative and organizational structures, the respective performance of functions, and the public's perception of the companies. *Simeone v. Bombardier-Rotax GmbH*, 360 F. Supp. 2D 665, 675 (E.D. Pa. 2005).

Radmore has failed to provide any evidentiary basis for concluding that Aegis is the alter ego of World Focus and Essar. He has not pleaded or established any of the indicia of an alter ego relationship. Accordingly, Essar and World Focus will be dismissed for lack of personal jurisdiction.

Failure to State a Claim

World Focus acquired Aegis as a wholly owned subsidiary "through a short-form merger that was not subject to fairness review" under § 253 of the Delaware General Corporation Law. Compl. ¶ 28. Section 253 provides that a company owning at least 90% of the voting stock of another corporation may merge the subsidiary into itself without providing notice of the merger to minority shareholders. Del. Code Ann. tit. 8, § 253(a). The majority shareholder need only notify the minority shareholders of their right to seek an appraisal once the merger has taken place. *Id.* § 253(d). Minority shareholders cannot prevent the merger nor object to it. They can only contest the valuation of the shares after the merger and demand appraisal in the Delaware Court of Chancery. *Id.*; *Glassman v. Unocal Exploration Corp.*, 777 A.2d 242, 248 (Del. 2001).

In a similar action brought by another Aegis minority shareholder, the Delaware Court of Chancery dismissed the case, holding that "the sole remedy to a minority shareholder challenging a short-form merger is appraisal." *Matulich v. Aegis Commc'ns Group, Inc.*, Civ. A. No. 2601-CC, 2007 WL 1662667, at *9 (Del. Ch. May 31, 2007), *aff'd on other grounds*, 942 A.2d 596, 598 (Del. 2008)[4] (citing *Glassman*, 777 A.2d at

[4] Because the *Matulich* plaintiff did not appeal the Court of Chancery's holding that his sole remedy was appraisal if World Focus had the authority to complete the short-form merger, the Delaware Supreme Court did not reach this issue.

248). The *Matulich* Court applied the rule that absent fraud or illegality in a short-form merger, a minority shareholder may not seek, as the plaintiff does in this action, a fairness review.

Unlike the plaintiff in *Matulich*, Radmore argues that he has alleged fraud. Pl.'s Opp'n at 3.[5] However, he has failed to plead fraud with the necessary particularity. At oral argument, to support his claim of fraud, Radmore referred specifically to three paragraphs of the complaint. Tr. 24:8-24. These paragraphs state that the defendants (1) "with malice and forethought increased the shares of Aegis . . . for no purpose," (2) the price per share "was blatantly unfair and fraudulent and was grossly inadequate," and (3) "[t]he transaction herein lacked fair dealing and fair process." Compl. ¶¶ 18, 34, 40.

Radmore's allegations fall far short of that required to allege fraud pursuant to Fed. R. Civ. P. 9(b), especially given that the "bald assertions or legal conclusions improperly alleged in the complaint" need not be credited. *In re Rockefeller Ctr. Props., Inc. Sec. Litig.*, 311 F.3d 198, 216 (3d Cir. 2002) (citing *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1429 (3d Cir.

[5] Radmore also claims to have alleged illegality. Pl.'s Opp'n at 3. Notably contrary to this assertion however, the complaint does not reference any potentially illegal acts by any of the defendants. Therefore, there is no cause to consider whether allegations of illegality would entitle the plaintiff's complaint to a remedy other than appraisal.

1997)). To comply with the requirements of Rule 9(b), a complaint must state "the date, place or time of the fraud," or otherwise inject "precision or some measure of substantiation into [the] allegations of fraud." *Lum v. Bank of Am.*, 361 F.3d 217, 224 (3d Cir. 2004) (quoting *Seville Indus. Mach. Corp. v. Southmost Mach. Corp.*, 742 F.2d 786, 791 (3d Cir. 1984)). Radmore has offered nothing more than conclusory allegations, which will not suffice.

Furthermore, Radmore admitted at oral argument that the only fraud about which he complains is the dilution of the shares. Tr. 34:23-35:13. Under Delaware law, a dispute as to share value does not constitute fraud. *Glassman*, 777 A.2d at 245 (citing *Stauffer v. Standard Brands Inc.*, 187 A.2d 78, 80 (Del. 1962)).[6] Indeed, the valuation of shares is subject to an appraisal that is exclusively within the purview of the Delaware Chancery Court.

Radmore's sole remedy in disputing Aegis's short-form merger is an action for appraisal in Delaware state court. Thus, he has failed to state a claim in this forum upon which relief can be granted.

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[6] Even though previously overruled, the Delaware Supreme Court return(ed) to *Stauffer* in Glassman, thus resurrecting the *Stauffer* decision as good law. Glassman, 777 A.2d at 248.

Notice Required by Del. Code Ann. tit. 8 § 262(d)

At oral argument, Radmore, for the first time, contested having received the requisite notice of his appraisal rights. Tr. 37:13-41:21; 58:19-24; *see* Del. Code Ann. Tit. 8 § 262(d).[7] He conceded that the notice requirement can be satisfied by notice to the stockholder's broker, and he admitted that he did not "know whether [his] broker" received such notice. Tr. 59:6-7. Rather, he argued that it was the defendants' "burden" to show that he received the proper notice and that, unless they met this burden, his remedy was not limited to appraisal. *Id.* 59:20-60:12. He represented that he would not assert that the required notice was not given if the defendant had proof. *Id.* 60:17-21 ("They don't have a copy of a notice that was sent to the broker. Let's see it. They can show it to me and I'll withdraw that argument. I don't see it here.").

On October 23, 2008, the defendants supplemented the record with the notice provided to Radmore's broker of his appraisal rights subsequent to the short-form merger. *See* Defs.' Supp. Mem. of Law Re: Notice at 4. This notice provided record shareholders

[7] Radmore argued that he pleaded lack of notice in his complaint. See Tr. 58:6-11. However, the complaint only alleges that "[t]he minority shareholders including plaintiff were not given any notice of the impending merger or any vote on the merger prior to its consummation," Compl. ¶ 42. Such notice is not required by § 262(d) for a § 253 short-form merger.

with information concerning their right to appraisal subsequent to the merger between Aegis, and ACG Acquisition, Inc., a wholly-owned subsidiary of World Focus.[8] Radmore did not argue that this notice was deficient or untimely. Instead, shifting his argument to avoid implication of judicial estoppel, he contends that he was never a shareholder of ACG Acquisition and that the notice produced by the defendants was not related to the merger between Aegis and World Focus. Pl.'s Reply at 1. He argues that it was the merger of Aegis into World Focus, and not Aegis into ACG Acquisition, that "is the subject of this lawsuit." *Id.*

Radmore's latest argument is contradicted by the facts. The Schedule 13E-3, filed with the Securities and Exchange Commission and cited in the complaint, makes clear that the merger involved "Aegis Communications Group, Inc. and ACG Acquisition, Inc," a "wholly-owned subsidiary of World Focus."[9] The defendants have produced evidence, which Radmore

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[8] An exhibit attached as Exhibit I to Radmore's Memorandum of Law on issue of Personal Jurisdiction (Doc. No. 15) and Exhibit I to Radmore's Motion to Amend/Correct Complaint (Doc. No. 16) noted that ACG Acquisition was a special purpose vehicle crested for the purpose of merging Aegis into a World Focus subsidiary.

[9] Because Radmore cites Schedule 13E-3 in his Complaint, it may be considered for purposes of dismissing this action. See *Winer Family trust v. Queen*, 503 F. 3d 319. 327 (3d Cir. 2007) (when deciding a motion to dismiss, courts consider documents incorporated into the complaint by reference).

does not dispute, that he received the notice through his broker. His attempt to avoid this undisputed evidence by arguing that the notice applied to some other merger is disingenuous.

Leave To Amend

Radmore has moved to amend his complaint to "substitute Essar Global Limited as party defendant" rather than Essar Investments. Pl.'s Mot. ¶ 10. The plaintiff, however, has failed to attach a proposed amended complaint to his motion, which "is fatal to a request for leave to amend." *Fletcher-Harlee Corp. v. Pote Concrete Contractors, Inc.*, 482 F.3d 247, 252 (3d Cir. 2007). Normally, without the proposed amended complaint, a court cannot "determine whether amendment would be futile." *Id.*; *see also Kanter*, 489 F.3d at 181 (stating the well-established rule that motions to amend may be denied "where pleading deficiencies would not [be] remedied by proposed amendments").

Nevertheless, at oral argument, Radmore was given the opportunity to explain the scope of his proposed amended complaint. He stated that he seeks only to amend the caption and there is "no change to the body of the Complaint itself." Pl.'s Reply at 1. Radmore has admitted that the proposed complaint alleges no new facts nor any allegations that would affect the jurisdictional inquiry. Tr. 8:4-21; 10:3-18. Rather, Radmore seeks to properly designate the Essar defendant. *Id.* 10:19-11:6. No matter what name is ascribed to the Essar

defendant - Essar Investments Ltd. or Essar Global Limited - there is no personal jurisdiction over that defendant. Additionally, Radmore has not fleshed out any claims of fraud. Accordingly, even absent a copy of the proposed amended complaint, we can determine that the proposed amendment would be futile because it does not change anything in the original complaint that would alter the disposition of this motion.

CONCLUSION

There is no personal jurisdiction over World Focus and Essar. As to the defendant Aegis, Radmore has failed to state a claim upon which relief can be granted. Therefore, the action will be dismissed.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES R. RADMORE	**: CIVIL ACTION**
	:
vi.	**:**
	:
AEGIS COMMUNICATIONS GROUP, INC., *et al.*	**: NO. 08-1616**

ORDER

AND NOW, this 4th day of December, 2008, upon consideration of the Defendants' Motion to Dismiss (Document No. 4), the plaintiff's response, supplemental briefing, and after oral argument, it is **ORDERED** that the motion is **GRANTED** and the complaint is **DISMISSED**.

/s/ Timothy J. Savage
TIMOTHY J. SAVAGE, J.

NOT PRECEDENTIAL
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 08-4751

JAMES RADMORE,
Appellant
v.
AEGIS COMMUNICATIONS GROUP, INC.,
ET AL.,
Appellees

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 08-cv-01616)
District Judge: Honorable Timothy J. Savage

Submitted Under Third Circuit L.A.R. 34.1(a),
September 15, 2009
Before: SLOVITER, FUENTES, and SMITH,
Circuit Judges.
(Opinion Filed: September 24, 2009)

OPINION OF THE COURT

FUENTES, Circuit Judge:

Appellant James Radmore appeals the District Court's dismissal of his claim charging

Aegis Communications Group, Inc., ("Aegis"), Essar Services (Mauritius) (f.k.a. World Focus), ("World Focus"), and Essar Investments Ltd., ("Essar," collectively "appellees"), with breaches of their fiduciary duties of loyalty, care and good faith in connection with the 2006 short-form merger wherein World Focus converted Aegis into a privately held corporation. First, the District Court dismissed Radmore's claims against World Focus and Essar pursuant to Fed. R. Civ. P. 12(b)(2), holding that it lacked personal jurisdiction over these foreign corporations. Second, the District Court dismissed Radmore's claims against Aegis pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief could be granted because the court determined that Radmore's sole remedy was an appraisal action in Delaware's Court of Chancery. For the foregoing reasons, we affirm the District Court's judgment.

I.

The District Court had jurisdiction over this case pursuant to 28 U.S.C. § 1332(a) and we have jurisdiction to hear this appeal under 28 U.S.C. § 1291. We exercise plenary review of the District Court's order granting appellees' motion to dismiss. See Santiago v. GMAC Mortgage Group, Inc., 417 F.3d 384, 386 (3d Cir.2005).

II.

Because we write primarily for the parties, we discuss the facts only to the extent necessary for resolution of the issues on appeal.

This suit stems from the 2006 short-form merger, executed pursuant to Section 253 of Delaware General Corporation Law, whereby World Focus acquired Aegis's outstanding minority common stocks by merging World Focus's wholly-owned subsidiary ACG Acquisition into Aegis. As a result, Aegis was converted into a privately owned company. Radmore, a minority shareholder, held 1,065,500 shares at the time of the merger. Pursuant to Section 262(d)(2) of Delaware General Corporation Law, Computershare mailed a Notice of the short-form merger via first class U.S. mail to all of Aegis's record holders of common stock. The document sent to record holders was entitled "Notice of Merger and Appraisal Rights." The first page on this Notice indicated Aegis's minority shareholders were to be paid five cents per share. Because Radmore was a beneficial owner of the stock, Notice was sent to Cede & Co., his broker and the holder of record.

Radmore commenced this action in Pennsylvania state court, accusing appellees of breaching their fiduciary duties of care, loyalty and good faith. He further contended that the merger lacked fair dealing and fair process. Radmore also stated that the five cent cash-out price was

"blatantly unfair and fraudulent and grossly inadequate compensation for the share"and a dollar below market value. (App. 13). Appellees removed the action to federal court and subsequently filed a motion to dismiss the complaint, contending, in relevant part, that: (1) the District Court lacked personal jurisdiction over World Focus and Essar, and (2) Radmore failed to state a claim because he did not plead fraud with the 1 Aegis conceded the District Court's jurisdiction. 2 Essar Investments is a privately held Indian company. It owns no shares of World Focus. (App. 397). sufficient particularity required by Fed. R. Civ. P. 9. [1]

The District Court granted appellee's motion to dismiss. Citing Provident Nat'l Bank v. California Fed. Savs. & Loan Ass'n, 819 F.2d 434, 437 (3d Cir. 1987), the Court ruled that it lacked general jurisdiction over foreign corporations World Focus and Essar, because Radmore failed to offer competent evidence demonstrating that either corporation had "substantial, continuing and systematic contacts with the forum." (App. 201). See also Reliance Steel Prods. Co. v. Watson, Ess, Marshall & Engass, 675 F.2d 587, 588-89 (3d Cir. 1982). The District Court also rejected Radmore's argument that its personal jurisdiction over Aegis could be imputed onto parent corporations World

[1] Aegis conceded the District Court's jurisdiction

Focus and Essar,[2] because he failed to demonstrate the requisite alter ego relationship. Thus, the District Court dismissed Radmore's claims against World Focus and Essar.

Next, the District Court granted Aegis's Rule 12(b)(6) motion to dismiss for failure to state a claim. Relying on Glassman v. Unocal Exploration Corp., 777 A.2d 242, 248 (Del. 2001), the District Court noted that Delaware's short-form merger statute permits a majority shareholder of at least 90% of another company's voting stock to merge that corporation into itself without providing notice to the minority shareholders of the merger. See Del. Code. a. Tit. 8 § 253(a). Absent fraud or illegality, Delaware law proscribes a minority shareholder from preventing a short-form merger. The shareholder may, however, challenge the valuation of his or her shares in Delaware Chancery Court via an appraisal action. Despite Radmore's protestations to the contrary, the District Court held that his allegations were bald and conclusory, falling "far short of that required to allege fraud pursuant to Fed. R. Civ. P. 9(b)." (App. 204). Having failed to adequately plead fraud or illegality, the District Court concluded that appraisal rights were the exclusive remedy available to Radmore.

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[2] Essar Investments is a privately held Indian company. It owns no shares of World Focus. (App.397).

Finally, the District Court rejected Radmore's assertion that notice was deficient because it related to a merger between Aegis and ACG Acquisition, and not a merger of Aegis into World Focus. The Court reasoned that Radmore's claim of inadequate notice was "disingenuous" because the Schedule 13E-3, filed with the Securities and Exchange Commission and cited in his complaint, makes clear that the merger involved 'Aegis . . .and ACG Acquisition, Inc.,' a 'wholly owned subsidiary of World Focus.'" (App. 207). Furthermore, The District Court noted that Radmore did receive notice through his broker. Therefore, The District Court granted Aegis's motion to dismiss.

III.

On appeal, Radmore argues that the District Court erred because: (1) evidence revealed "substantial and significant contacts [between World Focus, Essar and] the Commonwealth of Pennsylvania; (2) the complaint met Rule 9(b)'s heightened pleading standard; and (3) Aegis's notice was deficient. We consider each argument in turn.

A. The District Court Properly Granted World Focus's and Essar's Motion to Dismiss for Lack of Jurisdiction

The District Court properly ruled that it lacked personal jurisdiction over World Focus and Essar. Radmore correctly notes that the focus of general jurisdiction is on the defendant's relationship with

the forum state. See Mesalic v. Fiberfloat Corp., 897 F.2d 696, 699 (3d Cir. 1990). He continues to advance his argument that jurisdiction can be conferred on World Focus and Essar through their relationships with Aegis. See Appellant's Brief. at 20. Assuming, *arguendo*, that a district court could impute personal jurisdiction to a parent through its subsidy because the subsidy was the parent's alter ego, Radmore has failed to offer competent evidence demonstrating that such a relationship existed between World Focus, Essar and Aegis. The only specific piece of evidence Radmore cites in support of his alter-ego theory is an e-mail from Aegis employee and Pennsylvania resident Daniel Mattson to Essar employee Sandip Sen, wherein Mr. Mattson requested approval of an expense voucher. See Appellant's Brief at 20. This lone piece of evidence certainly does not demonstrate that Essar maintained continuous and substantial contacts with Pennsylvania such that the District Court had personal jurisdiction over appellees.

Finally, Radmore's attempt to confer personal jurisdiction through World Focus's and Essar's relationships with Essar Global Ltd. and Essar Group, see Appellant's Brief at 20-24, also fails because neither Essar Global Ltd. nor Essar Group is a party to this action. Likewise, Radmore's reliance on the failed bid of Essar Steel to Purchase Pennsylvania corporation Wheeling Pittsburgh does not alter our analysis since he did not name

Essar Steel as a defendant in this action.[3] Therefore, the District Court properly granted World Focus's and Essar's motion to dismiss for lack of personal jurisdiction.

B. The Court Properly Granted Aegis's Motion to dismiss for Failure to State a Claim

Next, the District Court correctly concluded that Radmore failed to plead fraud with the necessary particularity required by Rule 9(b). Indeed, the District Court properly characterized Radmore's allegations as bald assertions, conclusory statements, and improper legal conclusions. See Compl. at ¶¶ 34, 40 ("Said price was . . . fraudulent. . . .The Transaction . . . lacked fair dealing and fair process.") (App.13-14). Furthermore, the District Court correctly rejected Radmore's only specific allegation – that Aegis fraudulently increased shares of Aegis in order to dilute minority shareholders' interests – because a dispute over share value does not taint a short-form merger such that appraisal rights would no longer be a minority shareholder's exclusive remedy . See Glassman, 777 A.2d at 245.

[3] Likewise, Radmore's reliance on the failed bid of Essar Steel to Purchase Pennsylvania corporation Wheeling Pittsburgh does not alter our analysis since he did not name Essar Steel as a defendant in this action.

Additionally, the "context" of the complaint Radmore contends provides the particularity required by Rule 9(b) demonstrates Appellant's fundamental misunderstanding of Delaware's short-form merger statute. Radmore faults the legality of the short-form merger because it was not subject to fairness review and because Aegis did not send out advance notice seeking minority shareholders' approval of the merger. See Appellant's Brief at 17. In advancing these arguments, Radmore completely ignores Glassman's conclusion that "[b]y enacting a statute that authorizes the elimination of the minority without notice, vote, or other traditional indicia of procedural fairness, [Delaware] effectively circumscribed the parent corporation's obligations to the minority in a short-form merger." 777 A.2d at 243. Aegis was under no legal obligation to seek Radmore's approval of the merger or afford him advance notice of the transaction. Thus, Aegis's supposed inaction cannot serve as the basis for pleading fraud or illegality such that appraisal rights would not remain Radmore's exclusive remedy.

Finally, the District Court correctly held that Radmore had received proper notice of the short-form merger. First, for the reasons noted above and contrary to Radmore's assertions in paragraphs 31 and 42 of his complaint, Aegis was under no legal obligation to give minority shareholders advance notice of the short-form merger. Second, the District Court correctly held that Aegis complied with 8 Del. C. § 262(d)(2), Delaware's appraisal statute. Computershare timely mailed a Notice to

Radmore's broker. The Notice clearly set forth the merger's terms, including the corporations involved, the purchase price of minority shareholder's stock, and Radmore's right to seek appraisal. Radmore's reliance on Gilliand v. Motorola Inc., 859 A.2d 80 (Del. Ch. 2004), is misplaced because that case is readily distinguishable. Unlike the deficient notice in Gilliand, which only contained "the statutorily mandated information about the mechanics of perfecting a demand for appraisal and no other information relating to the value of the merged entity or its securities," the Notice at bar contained detailed disclosures. 859 A.2d at 82.

IV.

For the foregoing reasons, we affirm the judgment of the District Court.